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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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UNILEVER
PATENT DEPARTMENT
45 RIVER ROAD
EDGEWATER, NJ 07020

EXAMINER

HENDRICKS, KEITH D

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 06/20/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

09/880,199

Applicant(s)

VERRIPS, CORNELIS
THEODORUS

Examiner

Keith Hendricks

Art Unit

1761

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 16 June 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☒ A Notice of Appeal was filed on 16 June 2003. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ they raise the issue of new matter (see Note below);
- (c) ☒ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☒ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: see continuation sheet.

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☐ The a) ☐ affidavit, b) ☐ exhibit, or c) ☐ request for reconsideration has been considered but does NOT place the application in condition for allowance because: _____.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☒ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: none.

Claim(s) objected to: none.

Claim(s) rejected: 1 and 5-20.

Claim(s) withdrawn from consideration: _____.

8. ☐ The proposed drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
10. ☐ Other: _____

Continuation of # 2:

Applicants' definitions of the terms "probiotic", "health-active" and "[non] viable" are inconsistent both among the responses submitted, and with regard to the prior art. For example, see page 5 of the response of 6-16-03, pages 8-9 of the response of 10-25-02, and applicants' definition at page 6 of the specification.

Applicants' stated claimed invention (from the newly-submitted response, but not entered) is directed to a composition and method of use of "probiotic Lactobacillus bacteria which have been rendered non-viable... and wherein no substantial fermentation of the food product by said Lactobacillus bacteria will take place." For the record, applicants have submitted a supportive reference, Guarner et al. (1998) which states that "oral probiotics are living microorganisms", which would correspond to applicants' claims for probiotics which have been rendered non-viable. However, the phrase "wherein no substantial fermentation of the food product by said Lactobacillus bacteria will take place" would appear to conflict with the terms probiotic, and with the knowledge in the prior art.

Reference to Lee et al. (not applied in a rejection, but addressed by applicants in the response of 10-25-02, at pages 7-9) shows that bacteria which have been rendered non-viable, are still capable of producing acid from the remaining, existing chemical and enzymatic infrastructure of the microbe, and thus this acid works to ferment the surrounding food product, to a degree. At mid-page 9 of the response of 10-25-02, applicants state that "Lee et al. apparently have no interest, or intention in providing a probiotic effect to the person consuming the food product." Applicants imply that their claimed invention provides a "probiotic effect."

These two positions appear to conflict. Applicants' defined probiotic (i.e. living) bacteria which have been rendered non-viable (i.e. essentially non-living), could not, then, provide a "probiotic effect." Applicant appears to manipulate the definitions of these terms.

It is noted for the record that Lee et al. utilize lactic acid bacteria such as *Pediococcus cerevisiae*, *Streptococcus lactis*, *Lactobacillus acidophilus* and *Lactobacillus plantarum*, each of which was known in the art to be probiotic. Simply because the reference inventors did not address this term as of their filing date 1971, does not mean that these bacteria are/were not probiotic. They are.

Furthermore, it is important to note that the probiotic bacteria rendered non-viable, as taught by Lee et al., do in fact continue to produce acid for a period of time after being rendered non-viable, and this acid participates in fermentation of the food product containing the bacteria. However, applicants appear to be performing the same procedure, and yet claim that "no substantial fermentation" takes place. Applicants do not provide any special or unique means by which this different result is achieved, and in fact appear to simply render the bacteria non-viable as does the reference. Thus it is unclear as to how applicants may claim to arrive at a different result from the known evidence in the art.



KEITH HENDRICKS
PRIMARY EXAMINER